

Fusion of Mediation and Other ADR Mechanisms with Modern Dispute Resolution in Kenya: Prospects and Challenges

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**A Paper Presented at the Chartered Institute of Arbitrators, Kenya Branch, 1st
Mediation Conference held on 28th October 2022 in Nairobi, Kenya.**

Conference Theme: The Coming of Age for Mediation: Encounter From Africa.

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Abstract

The paper critically discusses the fusion of Alternative Dispute Resolution (ADR) mechanisms with modern dispute resolution in Kenya. It considers the concept of conflict management in Africa and the salient features of this process. The paper further highlights attempts towards fusing ADR mechanisms with modern dispute resolution in Kenya and canvasses some of the concerns emanating from this endeavor. The paper also proposes recommendations towards promoting ADR mechanisms in modern dispute resolution in a manner that preserves the key attributes of these mechanisms.

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1.0 Introduction

Mediation is a form of Alternative Dispute Resolution (ADR). ADR refers to a set of mechanisms that are used to manage conflicts without resort to courts¹. These mechanisms include arbitration, mediation, negotiation, conciliation and Traditional Dispute Resolution Mechanisms (TDRMs). In Kenya, ADR mechanisms have been recognized under the Constitution which mandates courts and tribunals to promote alternative forms of dispute resolution². ADR mechanisms have been hailed for their attributes which include informality, privacy, confidentiality, flexibility and the ability to promote expeditious and cost-effective management of disputes. They are thus seen as a viable tool of enhancing access to justice as envisioned under the Constitution³.

Mediation has been defined as a method of conflict management where parties to a conflict seek a solution with the assistance of a third party who facilitates discussion and flow of information and thus aiding in the process of reaching an agreement⁴. Mediation is a continuation of the negotiation process and arises where parties to a conflict have attempted negotiations, but have reached a deadlock⁵. Parties thus involve a third party known as a mediator to assist them continue with the negotiations and ultimately break the deadlock⁶. Mediation and other ADR mechanisms have been practiced in Africa for many centuries⁷.

The paper discusses mediation as a conflict management mechanism in the African context. It highlights the salient features of conflict management in Africa. The paper further looks at the fusion of mediation and other ADR mechanisms with modern legal

¹ Muigua, K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015; There is a debate on whether ADR is really 'alternative': See Muigua K. 'Effective Justice for Kenyans: Is ADR really alternative?' Law Society of Kenya Journal Vol 11(1)2015.

Should it be referred to as Appropriate Dispute resolution?

² Constitution of Kenya, 2010, article 159 (2) (c), Government Printer, Nairobi

³ Constitution of Kenya, 2010, article 48

⁴ Bercovitch, J., 'Mediation Success or Failure: A Search for the Elusive Criteria.' *Cardozo Journal of Conflict Resolution*, Vol. 7, p 289

⁵ Muigua, K., 'Resolving Conflicts through Mediation in Kenya.' Glenwood Publishers Limited, 2nd Edition, 2017

⁶ Ibid

⁷ Ibid

practice. It analyses the concerns arising from the current practice of ADR in Kenya and proposes solutions towards promoting ADR while preserving its salient features.

2.0 Conflict Management in Africa

Conflicts are a common occurrence in human interactions. Conflicts can be seen as the incompatibility of interests between two or more individuals⁸. They are often caused by a misalignment of goals, actions or motivations which can be real or only perceived to exist⁹. Conflict management refers to the various mechanisms undertaken towards stopping or preventing overt conflicts and aiding the parties involved to reach a durable and peaceful solution to their differences¹⁰.

Conflict management can result in either settlement or resolution of the underlying dispute¹¹. Settlement mechanisms are highly coercive, power based and involve a lot of compromise in addressing the conflict¹². These mechanisms include litigation and arbitration. They may be effective in providing an immediate solution to a dispute but fail to address underlying issues in a dispute leaving the likelihood of disputes reemerging in future¹³. Resolution on the other hand entails mutual problem sharing with the conflicting parties cooperating towards managing the conflict¹⁴. Resolution mechanisms include mediation, negotiation and facilitation. These mechanisms are non-coercive, non-power based and focus on the needs and interest of parties¹⁵. They result in mutually

⁸ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' *International Journal of Intercultural Relations* 30 (2006) 579-603

⁹ Ibid

¹⁰ Leeds. C.A., 'Managing Conflicts across Cultures: Challenges to Practitioners.' *International Journal of Peace Studies*, Volume 2, No. 2, 1997

¹¹ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit

¹² Ibid

¹³ Ibid; see also, Makumi Mwangi, 'Conflict in Africa: Theory, Processes and Institutions of Management, Centre for Conflict Research, Nairobi 2006; Makumi Mwangi, 'The Water's Edge: Mediation of Violent Electoral Conflict in Kenya (Institute of Diplomatic Studies), July 2008

¹⁴ Bloomfield. D., 'Towards Complementarity in Conflict Management: Resolution and Settlement in Northern Ireland.' *Journal of Peace Research*, Volume 32, No. 2, 1995

¹⁵ Muigua. K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Op Cit

satisfying outcomes that address the root causes of conflicts thus creating long lasting outcomes¹⁶.

The Conflict process is greatly influenced by culture¹⁷. Differences in attitudes, belief systems, religious practices, language, social set ups and economic practices among different cultures means that conflicts may take different forms in each culture¹⁸. Culture thus plays an important role in conflict management. The African culture upholds norms and values aimed towards promoting social cohesion and smooth running of the community¹⁹. These values include respect and honor for elders, unity, cooperation, forgiveness, harmony, truth, honesty and peaceful co-existence²⁰. Conflicts are therefore seen as a threat to the social fabric that holds the community together²¹. African communities have thus developed conflict management strategies that are aimed towards effectively dealing with conflicts in order to ensure peaceful co-existence within the community²². These mechanisms gave prominence to communal needs over individual needs²³.

The main objective of conflict management in Africa is to create consensus, facilitate reconciliation and maintain social cohesion within the community²⁴. African communities have thus developed conflict management strategies that revolve around the communities' social and cultural values, beliefs, norms and practices²⁵. Conflict

¹⁶ Ibid

¹⁷ Kaushal. R., & Kwantes. C., 'The Role of Culture and Personality in Choice of Conflict Management Strategy.' Op Cit

¹⁸ Ibid

¹⁹ Awoniyi. S., 'African Cultural Values: The Past, Present and Future' *Journal of Sustainable Development in Africa*, Volume 17, No.1, 2015

²⁰ Ibid

²¹ Adeyinka. A., & Lateef. B., 'Methods of Conflict Resolution in African Traditional Society' *An International Multidisciplinary Journal*, Ethiopia Vol. 8 (2).

²² Ibid

²³ Ibid

²⁴ Oladeji. T., & Bamidele. O., 'Africa: Understanding and Managing Violent Conflicts' *Conflict Studies Quarterly*, Issue 22, January 2018

²⁵ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Conflict-Resolution-by-Elders-successes-challenges-and-opportunities-1.pdf> (accessed on 04/11/2022)

management is administered by institutions such as the council of elders which ensures compliance with the final outcome due to the importance bestowed upon such institutions²⁶. Conflict resolution amongst African communities has since time immemorial taken the form of informal negotiation, mediation, reconciliation and arbitration by elders²⁷.

ADR mechanisms such as mediation have thus been part and parcel of the African culture. Colonization however resulted in subjugation of African cultural values that include conflict management practices²⁸. The introduction of Western Justice Systems resulted in disregard for traditional dispute resolution mechanisms as evidenced by the repugnancy clause²⁹. Traditional justice systems could only be applied in Kenya to the extent that they were not repugnant to the Western conception of 'justice and morality'³⁰. However, the importance of ADR mechanisms continues to be recognized as evidenced by the Constitution of Kenya, 2010 which advocates for their promotion³¹. This has resulted in fusion of ADR mechanisms such as mediation with modern legal practice in Kenya.

²⁶ Ibid

²⁷ Ibid

²⁸ Ghebretkle. T., & Rammala. M., 'Traditional African Conflict Resolution: The Case of South Africa and Ethiopia' available at <https://www.ajol.info/index.php/mlr/article/view/186176> (accessed on 04/11/2022)

²⁹ Judicature Act, Cap. 8, Laws of Kenya, S 3 (2)

³⁰ Ibid

³¹ Constitution of Kenya, 2010, article 159 (2) (c),

3.0 Fusion of Mediation and other ADR Mechanisms with Modern Legal Practice in Kenya

The Constitution of Kenya envisages the use of mediation and other ADR mechanisms in promoting access to justice³². The Constitution further recognizes the role of culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation³³. Mediation and other ADR mechanisms including Traditional Dispute Resolution Mechanisms (TDRMs) are an expression of the cultural heritage of the people of Kenya.* Promoting ADR mechanisms is thus in line with recognition of the fundamental role of culture as the foundation of the nation.

There have been various attempts to fuse mediation and other ADR mechanisms with modern legal practice in Kenya. A good example is the Court Annexed Mediation (CAM) project that was introduced in 2016 in the Commercial and Family Division of the High Court in Nairobi³⁴. The programme has been hailed for its ability to promote expeditious and efficient management of disputes³⁵. It further incorporates other attributes of mediation since parties are not forced to reach a settlement³⁶. CAM in the Family Division of the High Court has been hailed for promoting management of disputes in a reconciliatory and cost-effective manner and helping to restore broken relationships³⁷.

Another milestone towards fusion of ADR mechanisms with modern legal practice in Kenya is the use of Court-Annexed Alternative Justice Systems. This has been adopted in specific court stations such as Isiolo whereby council of elders are involved in management of disputes³⁸. Under this system, court may refer disputes to the elders

³² Constitution of Kenya, 2010, Article 159 (2) (c)

³³ Ibid

³⁴ World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans' available at <https://www.worldbank.org/en/news/feature/2017/10/05/court-annexed-mediation-offers-alternative-to-delayed-justice-for-kenyans> (accessed on 04/11/2022)

³⁵ Ibid

³⁶ Ibid

³⁷ Business Daily., 'Judiciary Counts gains of Court Annexed Mediation' available at <https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/judiciary-counts-gains-of-court-annexed-mediation-3420850> (accessed on 04/11/2022)

³⁸ Judiciary., 'Alternative Justice Systems Baseline Policy' available at https://www.unodc.org/documents/easternafrika//Criminal%20Justice/AJS_Baseline_Policy_2020_Ke nya.pdf (accessed on 04/11/2022)

where parties have agreed to the process or where it is determined that the elders are best placed to resolve the dispute³⁹. This process recognizes the importance of Traditional Justice Systems especially among indigenous communities in Kenya and seeks to adopt it within modern legal practice in Kenya.

There has also been the growth of institutions offering ADR services especially arbitration and mediation in Kenya. These institutions include the Chartered Institute of Arbitrators, Kenya, the Nairobi Centre for International Arbitration and the Mediation Training Institute among others. These institutions have promoted the fusion of ADR mechanisms within modern legal practice by formulating rules and guidelines to govern the ADR processes conducted by them⁴⁰.

In the commercial justice sector in Kenya, ADR mechanisms especially mediation and arbitration have been successfully adopted⁴¹. Most commercial contracts contain dispute resolution clauses which envisage the use of ADR mechanisms such as negotiation, mediation and arbitration in management of disputes between the parties. In commercial disputes, there is need to manage such disputes efficiently and expeditiously in order to preserve the commercial interests of parties⁴². Parties can thus benefit from the attributes of ADR mechanisms including privacy, confidentiality and the ability to promote expeditious and cost effective management of disputes towards managing commercial disputes in Kenya.

³⁹ Ibid

⁴⁰ See for example the Nairobi Centre for International Arbitration, Arbitration and Mediation Rules, available at <https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf> (accessed on 04/11/2022); See also the Chartered Institute of Arbitrators, Kenya Branch, Arbitration rules, available at <https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf> (accessed on 04/11/2022)

⁴¹ Muigua. K., 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' available at <http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf> (accessed on 04/11/2022)

⁴² Moses. L.M, *The Principles and Practice of International Commercial Arbitration* 2nd Edition, 2017, Cambridge University Press

4.0 Key Concerns

The fusion of mediation and other ADR mechanisms with modern legal practice in Kenya raises several concerns. This could result in the loss of some of the attributes of ADR mechanisms such as informality⁴³. Fusion of mediation and other ADR mechanisms with modern legal practice could result in regulation of these mechanisms which may defeat some of their attributes that are critical for their success⁴⁴. There is need to safeguard key features of ADR mechanisms even as they are adopted in modern legal practice.

Further, globalization has had significant impacts on the African culture affecting the traditional notion of conflict management⁴⁵. Disputes among people from different cultures or communities are now common. In such disputes, one party may not be willing to submit himself/herself to the conflict management process of another culture or community⁴⁶. The efficaciousness of the traditional concept of mediation and other ADR mechanisms is thus limited to disputes involving people from the same community⁴⁷.

Further, cross border legal practice has resulted in emergence of new areas of practice such as International Commercial Mediation that go beyond the traditional understanding of mediation⁴⁸. International Commercial Mediation is highly regulated through procedural laws and a legal framework governing the enforcement of

⁴³ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' available at <http://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (accessed on 05/11/2022)

⁴⁴ Ibid

⁴⁵ Madu, C. J. (2019). 'Globalization and African development: an overview' *African Journal of Social Issues* (AJOSI), 2(1), 96-105.

⁴⁶ Ibid

⁴⁷ Ibid

⁴⁸ Erie. M., 'The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution' available at https://ora.ox.ac.uk/objects/uuid:85a05c4c-8aab-45e2-bc8e-f699e93c8f7c/download_file?file_format=pdf&safe_filename=The%2520New%2520Legal%2520Hubs_SS_RN.pdf&type_of_work=Journal+article (accessed on 05/11/2022)

international commercial mediation agreements⁴⁹. This may defeat some of the attributes of mediation in the African context such as informality and confidentiality⁵⁰.

The scope of ADR mechanisms such as arbitration and mediation has also expanded and they are now being used to manage disputes in emerging areas such as Environmental, Social and Governance (ESG) disputes⁵¹. These include climate change disputes⁵². Fusion of ADR mechanisms with modern legal practice should take into account emerging frontiers of legal practice.

5.0 Way Forward

ADR mechanisms such as mediation play a vital role in enhancing access to justice in Kenya. Fusion of mediation and other ADR mechanisms with modern legal practice is important towards increasing the uptake of these mechanisms. However, certain measures can be undertaken to streamline this process.

There is need for a clear legal and policy framework governing ADR mechanisms in order to recognize and affirm the importance of these mechanisms in the administration of justice and establish a clear interface between ADR mechanisms and the formal processes⁵³. Such framework should be designed in a way that harmonizes ADR mechanisms with modern legal practice by delimiting the nature of disputes that can be

⁴⁹ Muigua. K., 'The Singapore Convention on International Settlement Agreements Resulting from Mediation: Challenges and Prospects for African States.' available at <http://kmco.co.ke/wp-content/uploads/2019/12/The-Singapore-Convention-on-International-Settlement-Agreements-Resulting-from-Mediation-Kariuki-Muigua-December-2019.pdf> (accessed on 05/11/2022)

⁵⁰ Ibid

⁵¹ Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' available at <http://kmco.co.ke/wp-content/uploads/2022/09/The-Place-of-Environmental-Social-and-Governance-ESG-in-Arbitration-2.pdf> (accessed on 05/11/2022)

⁵² Doyle, J. 'Mediating climate change.' available at https://scholar.google.com/scholar?cluster=17010099440521737254&hl=en&as_sdt=0,5#d=gs_cit&t=1667633789581&u=%2Fscholar%3Fq%3Dinfo%3AIZv1Gb-ncRcJ%3AScholar.google.com%2F%26output%3Dcite%26scirp%3D1%26scfhb%3D1%26hl%3Den (accessed on 05/11/2022)

⁵³ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' available at <http://kmco.co.ke/wp-content/uploads/2018/08/LEGITIMISING-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA.pdf> (accessed on 05/11/2022)

managed ADR mechanisms, the institutions responsible for administering ADR mechanisms and enforcement of decisions resulting from these processes⁵⁴. There have been attempts towards achieving this such as the introduction of the Alternative Dispute Resolution Bill in Parliament and the formulation of the ADR policy⁵⁵. There is need to fast-track this process in order to promote ADR mechanisms in Kenya. Further, the ADR framework in Kenya should Re-Africanize conflict management by preserving the African values of justice which are based on reconciliation and restorative justice⁵⁶.

Further, fusion of mediation and other ADR mechanisms with modern legal practice should ensure that key attributes such as informality and confidentiality are maintained. It has been asserted that this process such as the Court-Annexed Mediation Programme could result in the loss of some of the attributes of ADR mechanisms such as voluntariness, confidentiality and party autonomy⁵⁷. There is need to preserve the key features of ADR mechanisms in modern legal practice in order to ensure their viability in promoting access to justice⁵⁸.

ADR mechanisms such as mediation and arbitration should also be promoted in emerging areas such as Environmental, Social and Governance (ESG) disputes. These mechanisms are viable in managing ESG disputes⁵⁹. Through this, the landscape of ADR will be expanded towards fostering '*Appropriate Dispute Resolution*⁶⁰.'

⁵⁴ Ibid

⁵⁵ The Alternative Dispute Resolution Bill, 2021, available at <http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf> (accessed on 05/11/2022); See also

⁵⁶ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' Op Cit

⁵⁷ Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' *Alternative Dispute Resolution* (2017): 130

⁵⁸ Ibid

⁵⁹ Muigua. K., 'The Place of Environmental, Social and Governance (ESG) in Arbitration' Op Cit

⁶⁰ Menkel-Meadow, C. 'Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes.' *Chapter, 50*, 1-28.

6.0 Conclusion

ADR mechanisms such as mediation have been practiced in Africa for many centuries⁶¹. These mechanisms are an expression of the cultural heritage of the African people⁶². The importance of ADR mechanisms in Kenya has resulted in their recognition under the Constitution⁶³. Consequently, there have been attempts towards fusion of ADR mechanisms with modern legal practice in Kenya such as the Court-Annexed Mediation Programme⁶⁴. However, fusion of ADR mechanisms with modern legal practice raises certain concerns such as the loss of key features including informality, privacy and confidentiality⁶⁵. There is need to promote ADR mechanisms by fusing them with modern legal practice. However, this should be done in a way that ensures key attributes of ADR mechanisms are preserved in order to ensure their viability in promoting access to justice⁶⁶. Further, there is also need to Re-Africanize conflict management by preserving the African values of justice which are based on reconciliation and restorative justice⁶⁷. Through this, the fusion of ADR mechanisms such as mediation with modern legal practice will enhance access to justice while promoting the key goals of conflict management in Africa.

⁶¹ Kariuki. F., 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' Op Cit

⁶² Ibid

⁶³ Constitution of Kenya, 2010, Article 159 (2) (c)

⁶⁴ World Bank., 'Court Annexed Mediation Offers Alternative to Delayed Justice for Kenyans' Op Cit

⁶⁵ Shako. F., 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' Op Cit

⁶⁶ Ibid

⁶⁷ Muigua. K., 'Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework' Op Cit

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